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In the

Supreme Court of the United States

OCTOBER TERM 1965

No. 1100

SOUTHWESTERN LIFE INSURANCE COMPANY
and VALLEY ROYALTY CORPORATION,
Petitioners,

v.

PAN AMERICAN PETROLEUM CORPORATION
and SOCONY MOBIL OIL COMPANY, INC.,
Respondents.

REPLY BRIEF

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REPLY BRIEF

To the Honorable Supreme Court of the United States:

JURISDICTION

Although this court has jurisdiction under 28 U.S.C. 1254(1), it is not such a case as is contemplated by Supreme Court Rule 38-5, because:

It is a case of simple conversion. Southwestern Life Insurance Company and Valley Royalty Company (petitioners) exercised dominion and control over the property of Pan American Corporation and Socony Mobil Oil Company (respondents) and have retained the proceeds from

its sale. (They received the production and proceeds from oil wells slanted under respondents' leases from 1955 to 1962 and are adjudged to return the last two years — prior rights being barred by limitation.)

SUMMARY OF FACTS

The facts are fairly stated in the Circuit Court Opinion (appended to the Petition for Certiorari — 340 F. 2d 211).

The uncontested facts are:

1. Petitioners signed division orders and transfer orders which provided for the delivery and sale of oil from the wells located on the H. L. Long-Willie Starr Lease. Pretrial Order, R. 60; R. 246.

2. The production and proceeds received by petitioners are identified with the division orders and transfer orders. R. 245-247. The wells from which the oil was produced, though surfaced on the H. L. Long-Willie Starr Lease, were bottomed under and produced from respondents' leases. Jury Verdict, R. 86 et seq, Stipulation, 132.

3. Petitioners had tight control over the said lease, such that they were assured that the wells would be produced, the production sold, and the proceeds paid to them. H. L. Long, W. W. Long and Sarah Erickson (from whom petitioners acquired their rights — referred to as the Long group) cou' l not get their hands on the proceeds, could not possibly divert the proceeds. Petitioners' control over the production was never questioned by the pipe line purchaser or by the

Long group. The details of this control are reviewed in the Circuit Court's Opinion.

4. Petitioners had no legal right to receive or retain the production, regardless of their innocence.

NOT A CURRENCY TRANSACTION

The money received by petitioners is identified with the assignment of production in the conveyances received from the Long group, identified with the division orders and transfer orders under which petitioners sold the production to the pipe line purchaser, identified with the property over which petitioners had control under its contracts with the Long group. It is the proceeds of production sold by petitioners.

These facts distinguish it from cases such as *Holley v. Missionary Society*, 180 U.S. 284, 21 S. Ct. 395; 45 L. Ed. 531, where the facts were: The executor of an estate was also an attorney. He misapplied funds of a client and paid them to devisees of the estate of which he was executor. Since the devisee had no knowledge of the wrongful source of the funds, it was a payment in due course of business, a currency transaction, and the devisee was not required to return the money.

Fidelity Mutual Life Ins. Co. v. Clark, 203 U.S. 64; 27 S. Ct. 19; 51 L. Ed. 91. Attorneys received an assignment of a contingent interest in a life insurance policy upon which they obtained the recovery, appealing it through the Federal Court. After the judgment was paid and the attorneys had received their contingent interest, the insurance company

discovered that the insured was not dead but alive and that the company had been the victim of a hoax. The insurance company recovered the amount paid the beneficiaries because of their fraud, but denied recovery against the attorneys because of their innocence and their payment of full value. The decision would be the same, the court said, whatever kind of property was involved.

> "We are putting no emphasis on the fact that the thing transferred was money."

Although the payment was made by the insurance company pursuant to the judgment, it was still in the nature of a voluntary payment, with legal title passing. The right of the insurance company to recover back is an equitable right and can be enforced against assignees only if assignees had notice or failed to pay a valuable consideration.

Petitioners assert that the Circuit Court's decision makes the mortgagee liable for the torts of the debtor (Petition for Certiorari, p. 7), citing such cases as *Snodgrass v. Kelley*, 141 S.W. 2d 381, holding that the non-operator of an oil and gas lease is not liable for the torts of the operator. But the Circuit Court in its decision expressly held that SWL, the mortgagee, was not liable for the tort of H. L. Long in slanting the wells under plaintiffs' leases. Otherwise SWL would have been liable to plaintiffs for the full amount of production received by it, without regard to the two year statute of limitation, because the acts of fraudulent concealment by Long would have been imputed to SWL. Liability of SWL was based on conversion, not because Long's acts were imputed to it.

RECOVERY ON THE BASIS OF CONVERSION

In *Lingo Leeper Co. v. Harris*, 11 S.W. 2d 589, it is stated:

> "To constitute a conversion of property there must be some repudiation of the owner's right, or an exercise of dominion over it wrongfully in denial of or inconsistent with the owner's right."

Approved, *Morrison v. Farmer*, 210 S.W. 2d 245, reversed on other grounds, 213 S.W. 2d 813, it is sometimes referred to as "illegal" assumption of ownership. *Wilson v. Moore*, 122 S.W. 577; *Compton v. Harrington*, 16 S.W. 2d 345.

In *Staats v. Miller*, 240 S.W. 2d 342, reversed on other grounds, 243 S.W. 2d 686, the court says:

> "When the word conversion is used to signify tort, it may be defined as any distinct act of cominion wrongfully asserted over another's personal property in denial of the owner's rights or inconsistent with them * * * the essence of conversion is not the actual taking of the owner's property or carrying it away; it is wrongfully depriving the owner of its use and possession. The taking must be wrongful, for without the element of wrong, no tort can be committed and conversion cannot occur. To be wrongful, the conversion must be wholly without the owner's sanction or assent, either expressly or impliedly."

Accord, *GC&SF v. Buckholtz State Bank*, Com. App., 270 S.W. 1008; *Zerr v. Howell*, 88 S.W. 2d 116.

(See 14 *Tex. Jur.* 2d 19-26 for discussion of various acts of conversion.)

The intent of the converter is immaterial.

A distinction is drawn, however, with reference to the wrongful or innocent intent of the converter, in this, that if he had wrongful intent, the owner may elect whether to

recover the value of the property taken or to trace it into other property acquired by the converter, whereas, if the converter was innocent of intentional wrong-doing, the owner is limited to recovery of the actual value of the property converted.

Restatement — Restitution, Par. 128:

> "Thus, restitution under the rule stated in this section is permitted where a person has stolen or otherwise wrongfully taken a chattel from the possession of another, or where he has purchased it from a person who had no power to transfer title. The rule is also applied to a person who properly having acquired a chattel from the owner improperly uses or retains it, as well as to a person who as ostensible owner purports to sell goods to a third party who takes possession of it." (Pg. 527)
>
> * * * * *
>
> "If the converter transferred the subject matter with knowledge of the facts, the owner is entitled at his election to receive from the converter either the value of the property taken, or if it was sold, out of money received therefor, or if exchanged, the value of that which was received in exchange. If the converter had no knowledge of the facts at the time of such transfer, the owner is not entitled to receive from him the value of what was received in exchange, but is entitled to receive only the value of the converted things." (Pg. 535) Accord: Restatement — Restitution, pg. 596, 608.

Since the only relief sought against SWL is the recovery of the agreed value of plaintiffs' oil at the time it was taken, the matter of intent is immaterial.

In *Pressley v. Cooper*, S. Ct., 284 S.W. 2d 138, it was held that the sale of horses constituted a conversion, and that no demand for return was necessary.

In *Moore v. Carey Bros. Oil Co.*, Com. App., 269 S.W. 75, it was held that the sale of oil well casing which did not pass under the terms of an assignment was an act of conversion.

Lang v. Harwood, Civ. App., 145 S.W. 2d 945, is to the same effect, where an unauthorized sale by the mortgagee was considered a conversion.

53 *Am. Jur.* 837, Para. 41:

> "There are many cases in which a person who purchases or accepts the possession of stolen personal property is liable for the conversion thereof. In some cases this result is reached, regardless of the fact that the defendant may have acted in good faith without notice and in reliance on the thief's representation of ownership. The rule is generally applied where in addition to the act of purchasing the goods, or accepting possession thereof, the defendant appropriates the property or holds it to his own use, or refuses to comply with a demand of the owner to surrender possession, or sells, transfers, or disposes of the goods."
>
> Accord: 12 Tex. Jur. 2d — Conversion — Sec. 21.

Fenley v. Ogletree, 277 S.W. 2d 135, Er. Ref. n.r.e. The purchaser of timber was liable as converter despite his good faith.

PAYMENTS BY SWL BACK TO LONG

What SWL may have done with the money received by it from the sale of stolen oil in no wise restricts plaintiffs' recovery for the conversion. The conversion was based on acts of cominion and control over the stolen oil. This dominion and control consists of the sale by SWL (division orders and transfer orders) and the control it had over the lease op-

erations and over Long, all as outlined in the Circuit Court Opinion. SWL sold and controlled *all* the production, not just what it eventually retained. The payment by it to Long does not mitigate plaintiffs' damage, as would be the case if SWL had paid part of the money over to plaintiffs.

Gulf Corporation v. Lone Star Producing Co., 332 F. 2d 28 is not analogous. This case had nothing to do with conversion, but rather with money paid by mistake. Equitable relief was applied, whereas in our case conversion is a legal remedy.

It is respectfully submitted that the Petition for Certiorari should be denied.

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I certify that a copy of the foregoing Brief has been mailed in an envelope properly addressed, with postage prepaid, to the following parties at their last known address, this May 5, 1965: Swift, Walsh & McCarroll, Southwestern Life Building, Dallas, Texas.

Laine McLaughlin

Laine McLaughlin,
Secretary to Chas. F. Potter